DEC 8 1
MICHAEL RODAK, J

Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760,

—v.—

NATIONAL SEA CLAMMERS ASSOCIATION
AND GOSTA LOVGREN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS CITY OF NEW YORK AND BEAME

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QUESTIONS PRESENTED*

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§ 1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§ 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. §§ 1365 and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages resulting from ocean pollution as a general federal question under 28 U.S.C. § 1331.

3. Whether any federal common law nuisance action for alleged damages resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

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* The other parties not appearing in the caption named as appellees in the court below were the United States Environmental Protection Agency; Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency; United States Army Corps of Engineers; Martin R. Hoffman, individually and as Secretary of the United States Department of the Army; Bergen County Sewer Authority; The Joint Meeting of Essex and Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; The Linden Roselle Sewerage Authority; Middletown Sewerage Authority; the City of Glen Cove; and the City of Long Beach. Others named as parties in the District Court were the New York Department of Environmental Conservation; Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation; New Jersey Department of Environmental Protection; David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection; County of Westchester Department of Environmental Facilities; and the West Long Beach Sewer District.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.2d 1222. The opinion and judgment of the court of appeals are reproduced in the Middlesex Appendix at 1a and 37a. The opinion of the district court is not officially reported and is reproduced in the Middlesex Appendix at 40a.

JURISDICTION

The judgment of the court of appeals (Middlesex Appendix 38a) was entered on February 5, 1980. A timely petition for certiorari was filed by petitioners herein on May 5, 1980. An order granting the petition for certiorari and consolidating it with Nos. 79-1711, 79-1754, and 80-12 was entered on October 20, 1980 (Joint Appendix 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) 1251 *et seq.* are reproduced in the Middlesex Appendix at 72a *et seq.* The pertinent provisions of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. (& Supp. II) 1401 *et seq.*, the Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1331 *et seq.*, and the Submerged Lands Act of 1953, 33 U.S.C. 1301 *et seq.* are reproduced in an Appendix to this brief.

STATEMENT OF THE CASE

A. Pleadings and Proceedings Below

Respondent National Sea Clammers Association is an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey. Respondent Lovgren is an

individual similarly employed. Petitioners City of New York and Beame,[1] and the other parties in the District Court, are various federal, state and local officials and governmental departments that are charged with environmental protection or are responsible for sewage treatment and disposal.

Respondents allege that petitioners discharged or permitted the discharge of certain nutrient-rich sewage and toxic wastes into the Atlantic Ocean or its tributaries. Respondents complained of discharges allegedly made both in compliance with and in violation of federal regulatory statutes. They alleged that in 1976 these discharges caused death and other adverse effects on marine life, and, as a result, they sustained business losses.

The local governments discharge treated and untreated sewage from pipes ("point sources") into the territorial waters off their respective states pursuant to federal permits. In addition, sewage sludge, a by-product of modern sewage treatment, is placed in vessels which transport the materials and discharge them at various locations approximately 12 miles off the United States coastline. This dumping is also done pursuant to federal permits.

The complaint was dismissed by the district court on motions for summary judgment, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. The court of appeals reversed the order of dismissal of those claims based upon the Federal Water Pollution Control Act, 33 U.S.C. 1251-1376, the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1401-1444, the federal common law of nuisance, and the maritime tort law.

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1 Edward I. Koch replaced Abraham Beame as Mayor of the City of New York on January 1, 1978. Abraham Beame was sued individually and in his official capacity as Mayor.

B. Regulatory Scheme of the Clean Water Act

The Clean Water Act[2] provides for both federal and state regulatory power over the discharge of pollutants into the navigable waters, which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Federal technology-based effluent limitations for all discrete point sources of pollution must be met by certain specified dates. For publicly owned treatment works, with which we are concerned here, the Act requires application of "secondary treatment as defined by the Administrator" of the United States Environmental Protection Agency ("the Administrator") no later than July 1, 1977 (33 U.S.C. 1311(b)(1)(B), 1314(d)(1)), subject to extension to July 1, 1983 in specified instances. 33 U.S.C. (Supp. II) 1311(i). The secondary treatment requirement may be modified for publicly owned plants that discharge into marine waters upon a showing that state water quality standards will not be violated and that other potential uses of the waters will be protected. 33 U.S.C. (Supp. II) 1311(h). By July 1, 1983, all publicly owned plants must employ the "best practicable waste treatment technology over the life of the works," 33 U.S.C. (and Supp. II) 1311(b)(2)(B); 1281(g)(2)(A).

Discharges of untreated sewage resulting from overflows of combined storm and sanitary sewage systems are not considered publicly owned treatment works requiring the application of secondary treatment technology. See 40 C.F.R. 122.3(bb), 45 Fed. Reg. 33423 (1980) (to be codified at 40 C.F.R. 122.3). Hence they are regulated by conditions in discharge permits under 33 U.S.C. 1311(b)(1)(C) and 1342 (a)(2). Congress recently required the Administrator to submit a report on the problem of combined storm and sanitary sewer overflows, 33

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2 The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

U.S.C. (Supp. II) 1375(c), but did not mandate that they be eliminated.

In addition to his power to mandate the use of specific technology and specific discharge limitations, the Administrator also has authority to control water quality. Should a particular discharge from a point source, or the collective impact of a group of point sources, interfere with the attainment of that level of water quality necessary to protect a broad spectrum of potential uses, including protection of fish and other wildlife, the Administrator may impose stricter standards than those otherwise mandated. 33 U.S.C. 1312(a). However, stricter standards may not be imposed under this authority if a person affected by the proposed limitation demonstrates that there is no "reasonable relationship between the economic and social costs and the benefits to be achieved." 33 U.S.C. 1312(b)(2).

The Administrator has been given powers supplementary to those given in 33 U.S.C. 1312 over discharges into the oceans. The Administrator is authorized to promulgate guidelines for the degradation of the waters of the territorial seas, the contiguous zone, and the oceans. 33 U.S.C. 1343. All discharges must be made in compliance with the guidelines, which take into account a broad array of environmental factors. See 45 Fed. Reg. 65942-54 (1980).

States are allowed to impose more stringent controls than those imposed by federal authorities by either of two means. First, States have blanket authority under federal law to impose stricter effluent limitations on point sources within their jurisdiction than those imposed by the federal authorities.[3] 33 U.S.C. 1370. See *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board,* 426 U.S. 200, 218 (1976). Second, States may adopt overall water quality

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3 One exception is that facilities built after 1972 in conformity with applicable performance standards are given a grace period of up to ten years. 33 U.S.C. 1316(d). *See also* 33 U.S.C. 1322(f) (marine sanitation devices).

standards which may require a source to meet stricter effluent limitations than federal technology-based limitations.[4] 33 U.S.C. 1311(b)(1)(C). No cost benefit analysis is required for a State's imposition of stricter effluent limitations.

States are mandated to develop, subject to the Administrator's approval, water quality standards which cover both intrastate and interstate waters. 33 U.S.C. 1313.[5] Since these water quality standards must be reflected in any discharge permit, 33 U.S.C. 1311(b)(1)(C), including a permit for a point source affecting the waters of a neighboring State, 33 U.S.C. 1341 (a)(2), the individual States are given a means of protecting their waters from sources of out-of-state pollution. Out-of-state discharges incompatible with another state's water quality standards must be controlled by the regulatory authority issuing the permit to reflect the receiving state's water quality standards. *Id.* The applicant for any discharge permit must certify that the discharge will comply with applicable effluent limitations and state water quality standards. 33 U.S.C. 1341 (a)(1).

All interested parties, including a State whose water quality standards may be affected by a discharge, are entitled to notice and an opportunity for a hearing regarding the issuance of a permit. See *Costle* v. *Pacific Legal Foundation,* 48 U.S.L.W. 4243, No. 78-1472 (March 17, 1980); 33 U.S.C. 1341(a)(1), 1342(a)(1), (b)(3)-(b)(5), (j); 40 C.F.R. Parts 124-125; 45 Fed. Reg. 3384 *et seq.* (1980). An affected State may submit written recommendations to the Administrator or, if a State is administering the discharge permits, to the permitting State. If the permitting State does not accept the recommendations, it must

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4 See *United States Steel Corp.* v. *Train,* 556 F.2d 822, 830 (7th Cir. 1977).

5 The Interstate Sanitation Commission, a tri-state agency created pursuant to an agreement among New York, New Jersey and Connecticut to cope with pollution of New York Harbor and adjacent coastal waters pursuant to an interstate compact, see 49 Stat. 932, has established water quality standards for coastal waters within its jurisdiction.

notify the affected State and the Administrator of its reasons. 33 U.S.C. 1342(b)(5). Thereafter the Administrator may refuse to approve the permit, in which case the permit may not be issued. 33 U.S.C. (Supp. II) 1342(d)(2).

Compliance with a permit is deemed compliance with specified sections of the Act. 33 U.S.C. 1342(k). Most relevant here is that the sections specified in section 1342(k) include 33 U.S.C. 1311 and 1343—the sections which require permits to reflect effluent limitations necessary to protect state water quality standards and the federal guidelines for the degradation of the oceans. Hence compliance with a permit is deemed compliance with both those specific statutory sections limiting discharges of pollutants and with the water quality standards imposed by either the discharger's home State, any other State, or the federal government.

C. Regulatory Scheme of the Marine Protection Act.

Prior to the enactment of the Marine Protection Act,[6] the United States had no comprehensive law controlling the ocean disposal of wastes.[7] The Marine Protection Act, enacted in response to increasing concerns regarding unregulated dumping,[8] established a single, uniform regulatory scheme regarding

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6 The Marine Protection Act refers to the Marine Protection, Research and Sanctuaries Act of 1972, Pub. L. No. 95-532, 86 Stat. 1052, as amended by Pub. L. No. 93-254, 88 Stat. 50 and Pub. L. No. 95-153, 91 Stat. 1255, 33 U.S.C. (& Supp. II) 1401-1444.

7 The Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. § 407, and the Supervisory Harbors Act of 1888, 25 Stat. 209, 33 U.S.C. §§ 441-451(b), authorized the Corps of Engineers to regulate dumping within the navigable waters of the United States and beyond the territorial seas where barges transporting materials for dumping passed through the ports of New York, Baltimore or Hampton Roads, Virginia. Other federal statutes regulating the intentional or accidental discharge of certain materials in ocean waters were even more limited in scope, and unlike the 1888 and 1899 Acts did not require permits for ocean disposal.

8 See H.R. Rep. 92-361, 92d Cong. 1st Sess.; S. Rep. No. 92-451, 92d Cong. 1st Sess.

the dumping of material into ocean waters from vessels travelling from the United States, or by any United States vessel, or by any person if the dumping occurs in the territorial waters of the United States or the contiguous zone.

The Marine Protection Act regulates the dumping of all types of materials "to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401(b). Unless authorized by permit "[n]o person shall transport from the United States . . . any material for the purposes of dumping it into the ocean." 33 U.S.C. 1411. Permits for ocean dumping of dredged material are issued by the Secretary of the Army through the Corps of Engineers and permits for dumping of nondredged material, including sewage sludge, are issued by the Administrator. 33 U.S.C. 1412, 1413. In no event may dumping permits be issued except where the Administrator or the Secretary determines that the "dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities." 33 U.S.C. 1412(a), 1413(a). Nor may a permit be issued which will violate applicable water quality standards 33 U.S.C. 1412(a). The Administrator is required to promulgate criteria for the evaluation of permit applications for disposal of both dredged and nondredged material. 33 U.S.C. 1412(a), 1413(b).

Initial regulations were promulgated on October 15, 1973. 38 Fed. Reg. 28610. The regulations emphasized the environmental acceptability of ocean disposal of the wastes in question, focusing primarily on their physical and chemical characteristics. See 40 C.F.R. Part 227, as published at 38 Fed. Reg. 28618.

The regulations established several categories of permits. Material that complied with the Part 227 numerical criteria could qualify for a "special" three-year dumping permit. 40 C.F.R. 220.3(b), 38 Fed. Reg. 28614. Where the material could

not satisfy Part 227 limitations, but the applicant could show a need to dump and lack of alternatives which outweighed temporary or permanent environmental impacts, the regulations authorized the Administrator to issue an "interim" permit for a term of not more than one year. 40 C.F.R. 220.3(d), 38 Fed. Reg. 28614. Sites for dumping were designated in the individual permits. 40 C.F.R. 223.1(d); 38 Fed. Reg. 28616. Wastes which could present a hazard to fishing were to be disposed of at sites precluding such an interference. 40 C.F.R. 227.32; 38 Fed. Reg. 28619.

In 1977 the Administrator promulgated revisions to the regulations. 42 Fed. Reg. 2462 (1977). These revisions were prompted in part by ratification of the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 26 U.S.T. 2403, T.I.A.S. No. 8165.[9] The revised regulations refined the criteria for determining environmental acceptability. Instead of relying chiefly on a simple description of the constituents of the material, the regulations require bioassay tests to determine the actual effects of the material on exposed marine organisms. See 40 C.F.R.

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9 In the fall of 1972, an intergovernmental conference held in London adopted the Convention. At that time the United States signed the Convention; and on August 3, 1973, the Senate gave its advice and consent. The Convention was drafted

> to prevent the pollution of the sea by the dumping of wastes and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Convention, Article I.

The Convention prohibits ocean disposal of materials containing certain enumerated substances except under specified conditions. Convention, Annex I. The Convention also requires that special care be taken in the ocean disposal of certain other specified chemicals and materials which are likely to pose obstacles to navigation. Convention, Annex II.

On March 2?, 1974, Congress amended the Act to incorporate into domestic law those features of the Convention which were not then included in the basic statute. Public Law 93-254. 88 Stat. 50. That amendment became effective on August 30, 1975.

Part 227, Subpart B. In addition, the 1977 regulations added more specific provisions for assessing the need for the dumping, 40 C.F.R. Part 227, Subpart C, and provided new requirements regarding the significance of the need factor. Interim permits are available for the dumping of materials which do not comport with certain environmental impact criteria if specified prohibited materials are present only as trace elements, and if the need for dumping outweighs its environmental impact on potential other uses of the ocean. 40 C.F.R. 227.3.

Specific sites for the dumping of material, based on historical locations, were designated. The dumping of municipal sewage sludge was continued at a location approximately twelve miles from the shore. See 40 C.F.R. 228.12.

The Act was amended in 1978 to mandate the cessation of municipal sewage sludge dumping by the end of 1981. Sewage sludge was defined as that sludge which unreasonably degrades the environment. 33 U.S.C. (Supp. II) 1412a.

SUMMARY OF ARGUMENT

(1)

The Clean Water and Marine Protection Acts each contain an express provision authorizing any citizen or person to sue "on his own behalf" to compel enforcement of the respective statutes. The express remedies apply both to persons specially injured and to those suing simply as private attorneys general; the express remedies are the exclusive means to redress violations of the Acts.

The legislative history of the Clean Water Act, and the legislative history of the Clean Air Act, on which the express remedy was modeled, evidence a clear legislative intent to preclude development of court-defined standards of reasonable levels of water and air quality, or other court-developed remedies beyond those explicitly authorized. Congress deliberately

chose not to create a damage remedy for violation of these statutes. Damages, if available, may be sought only under State law which is the traditional source of such a common law entitlement. Creation of an implied right of action for damages would be to create a remedy which Congress explicitly and intentionally rejected.

(2)

There are explicit holdings by this Court that federal courts have no jurisdiction to adjudicate common law claims brought by private parties regarding nuisances occurring in navigable waters. While this Court has original jurisdiction under the Constitution to adjudicate cases in which a State alleges that the acts of another State, or acts of citizens in another State, are interfering with its quasi-soverign interests, and the federal district courts have jurisdiction under 28 U.S.C. 1331 to adjudicate these cases, the federal common law applied in these disputes may not be asserted by private parties. Neither the Constitution nor any statute authorizes actions by private parties to seek redress of interstate pollution under a federal common law.

Analysis of the statutes and treaties governing the jurisdiction and powers of the United States in the oceans adjacent to its territorial waters demonstrates that Congress has not asserted sovereignty over these waters. An assertion of sovereignty is a prerequisite to the development of a common law determining competing property rights. Congress has carefully defined those public and private rights it wishes recognized in the ocean waters. These rights do not include a common law available to private parties. Congress has expressed its sovereign interest in the oceans adjacent to the United States in the multitude of statutes it has passed regulating conduct in the area; the legislative and political judgment of Congress should not be supplemented by a court-developed common law of legal duties and liabilities.

(3)

Congress has authorized the United States Environmental Protection Agency to promulgate minimum discharge limitations and water quality standards for the territorial seas of the United States and the adjacent oceans. Congress has further mandated that States adopt their own water quality standards which are included by reference into federal discharge and dumping permits. These statutory provisions—and particularly the federally enforceable state water quality standards—have given States a means of protecting their waters from sources of out-of-state pollution. The need for development of a federal common law identified in *Illinois* v. *City of Milwaukee,* 304 U.S. 64 (1972), has been satisfied by a statutory mechanism. Moreover, state and federal discharge limitations and water quality standards have been promulgated which in and of themselves preempt common law standards. Should these standards be violated and damages result, state common law affords redress.

POINT I

THE WATER POLLUTION CONTROL STATUTES HERE IN ISSUE CONTAIN EXPLICIT STATUTORY REMEDIES WHICH DEFINE CITIZEN RIGHTS. NO OTHER REMEDIES CAN BE IMPLIED.

The City of New York generally concurs with the arguments submitted by the Solicitor General of the United States in the Environmental Protection Agency's petition for certiorari regarding the question as to whether the statutes in issue can be construed to contain implied rights of action. We rely on the position set forth in that petition, and submit only the following additional observations:

1. The Court of Appeals concluded that the citizen suit provisions of the two statutes, and their concomitant prerequisites to suit, applied only to those plaintiffs who have no

personal stake in the lawsuit under traditional standing doctrines and not to those who allege special injury. This conclusion has no basis in the statutory language. The Clean Water Act provision provides that, subject to the notice requirement, "any citizen may commence a civil action on his own behalf." 33 U.S.C. 1365(a). The Marine Protection Act is identical except for the use of the word "person" in place of "citizen." 33 U.S.C. 1415(g). A person suing "on his own behalf" surely includes a person who has been specially injured.

2. A common sense reading of the savings clause does not support the inference that Congress intended to "preserve" an unexpressed remedy available to private parties alleging special injury. The savings clause preserves concurrent remedies—it neither grants rights or remedies, nor acknowledges their existence under federal law. Compare *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 617-18 (1979) (42 U.S.C. 1983 is an *authorizing* statute); see *City of Evansville, Indiana* v. *Kentucky Liquid Recycling Corp.,* 604 F.2d 1008, 1014 (7th Cir. 1979) (savings clause of Clean Water Act creates no rights); see also *CETA Workers' Organizing Committee* v. *City of New York,* 617 F.2d 926 (2nd Cir. 1980) (savings clause of Comprehensive Employment and Training Act lends no support to inference of Congressional intent that implied right of action existed concurrently with express right).

3. The legislative history of the citizen suit provision of the Clean Water Act demonstrates that it was modeled on a parallel provision in the Clean Air Act Amendments of 1970. *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. (Comm. Print 1973) (hereafter "Leg. Hist.") 1497. A review of the legislative history of the citizen suit provision of the Clean Air Act demonstrates an unequivocal intent of Congress not to save "implied remedies" under the Clean Air Act itself or to authorize a damage remedy for statutory violations.

In the original Senate version of the Clean Air Act amendments, from which the citizen suit provision was derived, the

savings clause itself referred to saving rights "under other law." S. Rep. No. 91-1196, 91st Cong., 2d Sess. p. 123; see also p. 39. Although the word "other" was dropped in the House Senate Conference, the conference report still described the savings clause of the Clean Air Act as preserving "[o]ther rights to seek enforcement of standards under other provision [sic] of law." Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. § 304 (1971). Hence there appears to be no significance to the omission of the word "other" from the final bill.

The legislative history of the Clean Air Act also demonstrates an explicit intent not to create a damage remedy which the Court of Appeals has authorized in its decision below. The Senate Report describes the citizen suit provision thus:

> The section [304] does not, however, affect in any way whatever remedies such citizens or class of citizens might have under statutory or other law, nor does it provide for damage or nuisance actions. S. Rep. No. 91-1196, *supra* at 65.

This same point is reiterated in the Senate Report several times ("Section 304 would not substitute a 'common law' or court developed definition of air quality," *id.* at 36; "[t]here would be no jurisdictional amount required in section 304 nor is there any provision for the recovery of property or personal damages," *id.* at 38.

The only significant modification between the citizen provisions of the Clean Water Act and those of the Clean Air Act is that the Clean Water Act permits the courts to impose civil penalties in citizen suits. In this regard the Senate Report on the Clean Water Act emphasizes that the penalties are not available as damages to the citizen plaintiff:

> It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant. 2 Leg. Hist. 1497.

Hence the argument that an implied common law or other right of action for damages to fill in the "interstices" of this statute does not comport with the legislative history. This interstice was intentional.

4. In *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), this Court identified four factors for ascertaining whether a private right of action may be implied in a statute. The first three factors provide a means for ascertaining legislative intent, which we have discussed above. *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575-576 (1979). The fourth *Cort* factor is whether the matter is one that has traditionally been relegated to State law, and whether a federal remedy is appropriate. As is set forth more fully in Points II and III *infra*, common law rights in navigable waters are matters traditionally relegated to State law. The interstate and international character of the oceans do not *ipso facto* call for the creation of a federal common law remedy. The federal courts have no non-statutory authority to enforce common law rights, even in "federal territories." See cases cited at p. 28 *infra.* Congress has expressed the national concern with ocean pollution in a complex array of statutes, none of which authorizes, explicitly or implicitly, development of a federal common law.

In the nation's territorial waters, Congress has evidenced no intent to oust the States from their traditional role as being the primary source of legal rights and duties. The Clean Water Act supplies a federal remedy to what is essentially a State problem. Under the Act it is the States which establish the water quality standards with which all discharges of pollution must comply. 33 U.S.C. 1313; 1311(b)(1)(C). The statute states that it "is the policy of the Congress to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce and eliminate pollution. . . ." 33 U.S.C. (Supp. II) 1251(b). It cannot be argued that Congress has expressed a desire to oust State law and apply uniform federal rights and duties. Compare *Textile Workers' Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957).

In the Marine Protection Act, Congress has either incorporated applicable State water quality standards by reference or authorized federal officials to develop surrogate standards for ocean waters outside the jurisdiction of the coastal States. Implied property rights have no place in the scheme of the statute or under the statutory and international law which govern the high seas.

POINT II

CONGRESS HAS DETERMINED THAT STATE COMMON LAW, NOT FEDERAL, IS TO PROVIDE THE RULE OF DECISION FOR TORTS OCCURRING IN THE TERRITORIAL WATERS OF THE UNITED STATES AND THAT THE UNITED STATES WOULD NOT ASSERT GENERAL JURISDICTION OVER OCEAN WATERS ADJACENT TO TERRITORIAL WATERS. NO BASIS EXISTS FOR THE CREATION OF A FEDERAL COMMON LAW NUISANCE CLAIM FOR OCEAN POLLUTION ASSERTABLE BY PRIVATE PARTIES.

Although pollution flows freely from international waters into territorial waters and vice-versa, federal statutes and international law treat differently those activities occurring within the nation's territorial waters and those occurring outside them. The legal analysis set forth below follows this distinction and the two geographical areas are treated separately.

A. Federal Common Law In State Territorial Waters

In the Submerged Lands Act of 1953, 43 U.S.C. 1301-1315, Congress provided that the individual States would exercise jurisdiction over the lands and waters lying three miles seaward of the coastline. 43 U.S.C. 1311. Hence whatever rule is applicable to the nation's internal waterways applies to ocean pollution in the three mile ocean belt. We will show below that

it has long been established that no federal common law nuisance action is maintainable by private parties for pollution occurring in the nation's internal waters.

In *Willamette Iron Bridge Co.* v. *Hatch,* 125 U.S. 1 (1888), this Court held that a private citizen could not challenge a nuisance in a navigable waterway under the "federal common law." In *Willamette* a property owner sued to prevent the construction of a bridge which would have impeded boat access to his property which bordered a navigable waterway. This Court dismissed the suit, stating:

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law. . . . Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicated or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. 125 U.S. at 8.

While *Willamette* concerned an intrastate bridge, the Court made it clear that it was the private character of the parties and the non-sovereign interests they represented which precluded relief under federal common law or maritime law. The Court noted (at 125 U.S. 13-14) that if this nuisance interfered with the operations of the federal government, it would indeed have been actionable.

Willamette Iron Bridge was one of a long series of cases denying private parties the right to challenge under federal common law bridges or other obstructions of navigable waterways. See cases cited in *Willamette* at 125 U.S. 8-9; see also

Darling v. *City of Newport News,* 249 U.S. 540, 542-43 (1919) (holder of land under state tidal waters had no federal claim relating to damages sustained to fishing business by municipal discharge of sewage into those waters). The decision reflected the well-settled view that in the federal system the States were the proper entities to define primary legal obligations among private parties asserting conflicting rights. As stated in *Gilman* v. *Philadelphia,* 3 Wall. (70 U.S.) 713, 729 (1865), cited in *Willamette Iron Bridge:*

> It is for the municipal power to weigh the considerations which belong to the subject [of determining whether bridge traffic or river traffic shall have priority]. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress [over commerce].

Gilman and the other cases relied upon in *Willamette* are part of a settled federal judicial tradition that, in the absence of Congressional action, there is no federal common law to protect the property rights of citizens either civilly (see *Wheaton* v. *Peters,* 8 Pet. (33 U.S.) 591, 658 (1834) (author who had not complied with federal copyright statute had no federal common law right protecting his works from reproduction)) or criminally (see *United States* v. *Hudson,* 7 Cranch (11 U.S.) 32 (1812); *United States* v. *Coolidge,* 1 Wheat. (14 U.S.) 415 (1816) (federal courts have no jurisdiction over common law crimes)).[10] These rights are defined and protected by State law.

The principles applied in *Wheaton* v. *Peters, supra,* are particularly appropriate to the present action. There the plain-

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10 See generally Warren, *New Light on the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 73 (1923); Bator, Mishkin, Shapiro, Wechsler, *Hart and Wechsler, The Federal Courts and the Federal System* (2nd ed. 1973) 1262-65.

tiff sought the protection of federal common law to prevent unfair competition from another publisher who was printing copies of court decisions which the plaintiff had compiled. The plaintiff in *Wheaton* v. *Peters,* like the plaintiffs in the case at bar, had not complied with the statutory prerequisites to assert a claim under the federal copyright statutes. Even though the Constitution gave Congress the power to enact laws for the protection of authors' works, the Court refused to fashion a federal common law remedy and instead looked to Pennsylvania law to ascertain the plaintiff's rights.

The perspective of *Wheaton* v. *Peters* and *Willamette Iron Bridge* that state law is the basic source of property rights in the federal system has not changed in spite of the increasingly frequent use of Congressional power to determine the conduct of persons whose activities affect commerce. Unless Congress has otherwise acted, it is state common law, not federal, which defines property rights and supplies the rules of conduct even for parties engaged in interstate commerce. See, *e.g., Miree* v. *DeKalb County,* 433 U.S. 25, 31-33 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966); *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938); *cf. Perry* v. *Sinderman,* 408 U.S. 593, 604 (1972).

Congress's response to the decision in *Willamette Iron Bridge* was the enactment of the predecessor statute to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403.[11] See generally *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 663 (1973); *United States* v. *Republic Steel Corp.,* 362 U.S. 482, 488 (1960). No private rights were created. Both in the original enactment and in the later codifications enforcement is limited by its terms to actions brought by the United States Attorneys. 25 Stat. 425; 33 U.S.C. 413. See *Red Star Towing & Transportation Co.* v. *Dept. of Transportation,* 423 F.2d 104, 105 (3rd Cir. 1970); *Connecticut*

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11 The original enactment was Act of August 11, 1888, c. 860, § 9, 25 Stat. 424, and provided for the removal of obstructions at the demand of the Secretary of War.

Action Now, Inc. v. *Roberts Plating Co.*, 457 F.2d 81, 90 n.16 (2nd Cir. 1972); *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140, 1147 (N.D. Ala. 1971).

Congress's refusal to create private rights when it responded to *Willamette Iron Bridge* should not be overruled by creation of the very common law right rejected in *Willamette*. Certainly such private federal rights cannot be based upon the decision in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), relied upon by the court of appeals in the instant case. *Illinois* v. *Milwaukee* held that "federal common law" would be applied to determine the rights of a plaintiff State which claimed that citizens of another State were unreasonably polluting interstate waters. The Court reasoned that this common law was a "law" within the meaning of 28 U.S.C. 1331—hence the claim "arose under" federal law and was cognizable in the District Courts.

All of the cases relied upon in *Illinois* v. *Milwaukee* supporting the proposition that the federal common law was a "law" for adjudicating disputes under 28 U.S.C. 1331 involved claims by a State that its sovereign interests were being infringed upon by activities of persons in another State. In *Illinois* this Court quoted extensively from *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where the necessity behind development of a federal common law of nuisance was enunciated—that in the absence of statutory rules, a forum given authority to peacefully adjudicate disputes between formerly sovereign states must develop rules of decision to decide the competing claims.

The power given to the district courts in *Illinois* v. *Milwaukee* to adjudicate controversies under the federal common law is derivative from, and no greater than, the Supreme Court's power to adjudicate disputes in which a State is a party plaintiff. That power does not extend to private parties unless the Supreme Court's original jurisdiction to adjudicate claims in which a State is a party plaintiff extends to claims brought by private parties asserting their sovereign's claims. But clearly it does not. This Court has refused to allow intervention by

parties raising claims under a theory that they had cognizable interests their sovereigns did not represent. See, *e.g.*, *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953); *Kentucky* v. *Indiana*, 281 U.S. 163, 171 (1930). Compare *Darling* v. *City of Newport News*, *supra*, 249 U.S. 540 (1919) with *Georgia* v. *Tennessee Copper*, *supra*, 206 U.S. 230 (1907). Similarly, this Court has not permitted its original jurisdiction to be invoked even by a State to assert or protect the individual rights of its citizens. See, *e.g.*, *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883). The plaintiff must be a State and the dispute must involve an allegation of infringement of the State's sovereign interests in order for *Illinois* v. *Milwaukee* to apply.[12]

The common law applied in cases brought by a State under 28 U.S.C. 1331 reflects the entitlement the Constitution grants States not to have their sovereignty unreasonably infringed. As stated in *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907), "through these successive disputes and decisions the Court was practically building up what may not improperly be called interstate common law." This law has no counterpart in the common law applied in the courts of the individual States to adjudicate disputes among private parties. *Missouri* v. *Illinois*, 200 U.S. 496, 520 (1906). Hence the fact that some common law jurisdictions grant a right of action to private parties (such as fishermen) who allege "special injury" from torts categorized as public nuisances[13] has no persuasive value here. The logic of

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12 Hence, the statement in footnote 6 in *Illinois* v. *Milwaukee*, 406 U.S. at 105, that "it is not only the character of the parties that requires us to apply federal law," did not mean that the problem of interstate pollution alone would support federal question jurisdiction, but that the presence of States as parties in conjunction with a claim of interstate pollution would warrant such a suit. Footnote 6 cites, *inter alia*, *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 289 (1988)—a case (*and page*) standing for the proposition that the Supreme Court's original jurisdiction does not extend to monetary claims brought by a State against a citizen of another State.

13 See Prosser, *Private Action For Public Nuisance*, 52 Va. L. Rev. 997, 1013-1014 (1966); *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974).

the rules of decision applied in suits between sovereign states has a different basis from that applied in traditional common law suits. As stated in *Kansas* v. *Colorado,* 185 U.S. 125, 146 (1902):

> Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law as the exigencies of the case may demand.

See also *Connecticut* v. *Massachusetts,* 282 U.S. 660, 670 (1931); *North Dakota* v. *Minnesota,* 263 U.S. 365, 374 (1923). See generally, Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665, 680-85 (1959).[14] And principles of international law do not permit individuals the right to assert their sovereign's rights in a nuisance action. W. Bishop, *International Law* 463 (3d ed. 1971).

Nor does the interstate nature of pollution in the territorial seas mandate the creation of a federal common law to determine the rights of competing users of these waters. All interstate commerce has interstate consequences. Yet Congress has not deemed it necessary that torts occurring in the stream of commerce—nor even those arising from the operation of interstate carriers—be governed by a uniform body of federal tort law. See generally *Erie R.R. Co.* v. *Tompkins, supra.*

A lawsuit brought under state law is an available remedy to an individual unable to persuade his State that a suit under federal common law is necessary to protect its sovereign in-

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14 Indeed to rule that federal common law authorizes individuals to bring federal common law nuisance actions on the basis of *Illinois* v. *Milwaukee* would be, as Professor Currie has noted, bootstrapping:

> In one respect *Milwaukee* goes beyond even *Swift* v. *Tyson,* for in *Swift* it was possible to argue that the powers to create federal law was implicit in the grant of diversity jurisdiction, while in *Milwaukee* the District Courts' jurisdiction existed only if there was federal common law.

Currie, *Federal Courts, Cases and Materials* (2nd ed. 1974) 882.

terests in the territorial seas. State law is competent to cope with water pollution (or indeed any other tort) originating in another State or on the high seas affecting an individual's property. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding the validity of a Florida statute imposing strict liability for damages resulting from an oil spill by any ship destined for or leaving a Florida oil transfer station). Either federally mandated pollution limitations—which incorporate state water quality standards (see Point III, *infra*)—will govern the determination of what is reasonable conduct, or conflicts principles will determine whether the law of the State in which the injury occurs, or the law of the jurisdiction in which the pollution originates, governs the action. See *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 498-99 n.3 (1971). And the commerce clause will prevent States from imposing unreasonable water quality standards on their neighbors.

While the federal courts have developed non-statutory rules of decision in areas where adjudication of disputes in which the sovereign interests of the States have not been implicated—see generally, Friendly, J., *In Praise of Erie—and of the New Federal Common Law,* 39 New York Univ. L. Rev. 383 (1964)—these holdings will not support creation of a federal common law nuisance action for ocean pollution brought by private parties under 28 U.S.C. 1331. The courts have applied federal common law rules of decision either by explicit direction from Congress (see, *e.g., D'Oench Duhne & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 467-75 (1942) (Jackson, J., concurring)), or because the federal courts had been granted specific jurisdiction to adjudicate the particular dispute and the subject matter was so suffused with federal policy that only a uniform federal rule would effectuate national policy. See, *e.g., Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943); *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. 448 (1957). Federal jurisdiction did not exist in these cases because federal common law supplied the rule of decision; common law was applied because jurisdiction otherwise existed

and there was a necessity to fashion uniform federal rules to fill in the interstices of a federal statutory program. One commentator has stated the rule as follows:

> Thus, we see that, even though there may be no common law as a source of jurisdiction in the federal courts, there can nevertheless exist, as a means of exercising jurisdiction already conferred, a federal common law in the sense of a body of non-statutory rules independently announced and administered by those tribunals.

Von Moschzisker, R., *Common Law and Our Federal Jurisprudence,* 74 U. Pa. L. Rev. 109, 270, 367 at 117 (1925).

Even when federal policies are paramount, if a federal entitlement or liability cannot fairly be said to have been clearly implied by Congress, this Court has denied the existence of a federal remedy. See *United States* v. *Standard Oil Co. of California,* 332 U.S. 301 (1947), where the Court refused to create a common law right in the United States for the medical expenses it incurred in treating a soldier run over by a negligently driven truck. See also *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1965). And, as we demonstrated in Point I, *supra,* Congress evidenced no intent to create private federal entitlements or liabilities in the field of water pollution.

B. Federal Common Law Outside the Territorial Waters of the United States

The first general assertion of United States jurisdiction over the geographical area beyond the three-mile limit was President Truman's proclamation of September 28, 1945 (Exec. Proc 2667, 59 Stat. 884). The proclamation cited general United States dominion and power over the mineral resources of the outer continental shelf, and also affirmed the waters above the shelf as high seas. The extent of federal control in the three-mile belt of the outer continental shelf adjacent to the coasts was delineated in *United States* v. *California,* 332 U.S. 19 (1947). This Court decreed that federal dominion included

control over the lands and minerals underlying the ocean waters. The Court outlined the history of federal legislative and executive pronouncements in the area,[15] 332 U.S. at 33-37, and held that the assertion of national dominion by the executive and legislative branches of government over any particular territory was binding on United States courts.

In response to this decision and the need to demarcate property rights in the outer continental shelf, Congress in 1953 passed two statutes which set forth the basic legal framework for the governance of activities in this geographical area: The Submerged Lands Act of 1953, *supra,* 43 U.S.C. 1301-1315; and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. (1976) 1331-1343, 67 Stat. 462-470, as amended by Pub. L. 95-372, Title II, 92 Stat. 632 (1978), 43 U.S.C. (Supp. II) 1331-1356. These two statutes may be described as "constitutional" in that they (and applicable treaties) provide the basic legal framework for the scope of American jurisdiction in the outer continental shelf and the waters over the shelf.

As noted above, the Submerged Lands Act granted the respective coastal states jurisdiction and management of the lands and natural resources in the waters of the three-mile belt adjacent to their shores. 43 U.S.C. 1311(a). State law was provided as the applicable law of these areas. In the Outer Continental Shelf Lands Act, however, Congress took a different approach, and carefully preserved the character of the waters seaward of the States' territorial waters as high seas. Congress provided that the subsoil and seabed of the shelf were subject to the jurisdiction of the United States, 43 U.S.C. (1976) 1332(a), and that the civil and criminal laws of the respective adjacent States—except as preempted by Congress—would apply to the subsoil, seabed, and the artificial islands and structures built thereon. 43 U.S.C. (1976) 1[illegible].[16] But

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15 See also Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas,* 11 Stan. L. Rev. 597, 613-629, esp. at notes 112-114 (1959).

16 The state law applied is a species of "federal common law." See *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969).

Congress explicitly provided that the waters over the seabed were outside the jurisdiction asserted. 43 U.S.C. (1976) 1332(b). This provision was included to make "abundantly clear the unequivocal legislative intent" that the jurisdiction asserted was "horizontal jurisdiction" and did not affect the status of the superadjacent waters as international waters. Sen. Rep. No. 411, 83rd Cong., 1st Sess., at 2 (1953).[17] Parallel provisions were enacted in extensive 1978 amendments. See 43 U.S.C. (Supp. II) 1332 subd. (1) and (2); 1333(a).

The federal district courts were given jurisdiction over cases and controversies arising from the development of natural resources of the subsoil and seabeds. 43 U.S.C. (1976) 1333(b). A similar provision was reenacted in the 1978 amendments to the Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1349(b)(1). In addition, the 1978 amendments contain a citizen suit provision authorizing any person "having a valid legal interest" to institute an action to compel compliance with the Act. 43 U.S.C. (Supp. II) 1349(a)(1). The amendments also authorize "any resident of the United States who is injured in any manner" through the failure of an offshore mineral operator to comply with any requirement of the subchapter to bring a civil action for damages.[18] 43 U.S.C. (Supp. II) 1349(b)(2). The 1978 amendments again reasserted the character of these waters as high seas. 43 U.S.C. (Supp. II) 1332(2).

These statutory provisions clearly indicate that Congress has not asserted general jurisdiction over conduct on the high seas contiguous to United States territorial waters. The district courts were not even given general jurisdiction over all cases arising in the geographical area: specific types of cases were enumerated. These statutes do not impliedly authorize creation of a general common law applicable to the seas. See generally

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17 See Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier,* 6 Stan. L. Rev. 2334 (1953).

18 The legislative history of these amendments is set forth at 1978 U.S. Code Cong. & Adm. News 1450; these specific provisions are detailed at pp. 1566-1568, 1679-80; and 1710-13.

Treasure Salvors Inc. v. *Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978) (holding that under the Outer Continental Shelf Lands Act the federal government has asserted general jurisdiction over minerals, but not general sovereignty over the area). Congress has carefully crafted the private rights it wishes to create and protect in this area, and has stated explicitly the legal interests it wishes to protect. A right of action has been given for damages arising from mineral exploration activities in violation of federal law; state law applies to determining other rights flowing from mineral exploration; but no general right to be free from ocean pollution has been authorized. *Expressio unius.*

Any doubt as to the intent of Congress in not asserting territorial powers over these areas is resolved by the provisions of two treaties[19] to which the United States is a signatory. The first of the treaties to become effective was the Convention on the High Seas (T.I.A.S. 5200, [1962] 13 U.S.T. (pt. 2) 2313), which became effective on September 30, 1962. It provides (Article 2) that no nation may assert sovereignty outside its territorial waters except in limited instances not relevant here.[20] See generally *United States* v. *Louisiana,* 394 U.S. 11, 23 n.26 (1969).

The second convention to become effective was the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639, [1964] 15 U.S.T. (pt. 2) 1607). This Convention provides for national sovereignty over the "territorial seas" (Article 1) (without defining territorial seas), and provides for a "contiguous zone" of limited national sovereignty (Article 24). The contiguous zone may not extend beyond twelve miles from the landward edge of the nation's territorial waters. The coastal nation may exercise that control of activities in the contiguous

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19 A third treaty which regulates ocean dumping is described at p. 8, *supra.*

20 Article 22 (piracy); Article 23 (hot pursuit of ships believed to have violated laws in nation's territorial waters).

zone necessary for preventing infringement of "customs, fiscal, immigration or sanitary regulations within its territory or territorial sea." *Id.*

Although these conventions do not impair Congressional authority to regulate pollution emanating from American sources on the high seas, and although they do not impair Congressional authority to regulate pollution-related activities of foreign nationals in the contiguous zone which affect this country's interests, any general expression of national sovereignty in the contiguous zone is inconsistent with them. An assertion by the courts of one nation to regulate conduct in any particular geographical area has traditionally been viewed as an expression of sovereignty. Cf. *United States* v. *Louisiana, supra,* 394 U.S. 25-27; *United States* v. *California,* 381 U.S. 139, 174-175 (1965).

Moreover, the creation of a United States common law would have consequences on international law itself, for international law is a reflection of the generalized practices of individual nations. Bishop, *International Law, supra,* 30-33; Schwarzenberger, *The Dynamics of International Law* 6-7 (1976). Congress should make the ultimate decision as to how to shape international law in this area.[21]

Even apart from the statutes and conventions, we also note that United States domestic law has traditionally not been applied to activities outside the three-mile limit. For example, in *Cunard Steamship Co.* v. *Mellon,* 262 U.S. 100, 123 (1923), this Court refused to extend the eighteenth amendment to domestic merchant ships outside the territorial waters of the United States. The scope of legislation is "presumptively territorial," *Sandberg* v. *McDonald,* 248 U.S. 185, 195 (1918); *United States* v. *Perez-Herrera,* 610 F.2d 289, 290 (5th Cir. 1980). So ought to be the federal common law. And even in

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21 If federal common law rights assertable by private parties are authorized, *quaere* whether Canadian interests could challenge activities allegedly creating "acid rain."

federal territories a general federal common law has not been applied. Private rights in areas over which the government has acquired exclusive federal jurisdiction have been determined under the principle that, upon cession of territory, the laws existing at the time of cession remain in force until changed by the new sovereign. See *Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 100 (1940); *Chicago, R.I. & Pac. Ry.* v. *McGlinn,* 114 U.S. 542, 547 (1885); *Hart and Wechsler, The Federal Courts and the Federal System, supra,* p. 17 n.10, at 1268.

Congress has expressed the limited extent of United States sovereignty over the oceans seaward of the three mile limit in the numerous regulatory statutes it has passed. These statutes are listed in the margin.[22] The complex interplay among these

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22 In addition to the Outer Continental Shelf Lands Act which provides for damages arising from oil spills arising from drilling, the Federal Water Quality Improvement Act of 1970, 33 U.S.C. (1970) 1161 authorized the federal government to clean up oil spills from tankers and imposed strict liability on dischargers within certain limits. These limits were raised in the 1977 amendments to the Clean Water Act. The Port and Water Safety Act of 1972, 33 U.S.C. (1976) 1221-27, as amended by the Port and Tanker Safety Act of 1978, 33 U.S.C. (Supp. II) 1221-27 regulates the navigational devices and rules of ships in and adjacent to United States waters; the Intervention on the High Seas Act of 1974, 33 U.S.C. (1976) 1471-87 authorizes federal intervention in marine catastrophes on the high seas which threaten United States coastlines or the natural resources of the seas. The Marine Protection Act, directly involved in this lawsuit, governs the dumping of virtually any pollutant by a United States vessel under a permit system carefully weighing all environmental impacts; similarly the Clean Water Act governs the discharge of all pollutants from all points sources into the navigable waters. Federal jurisdiction over most living creatures existing in the fishery conservation zone (a 197 mile belt of water seaward of the territorial sea) was established in 1976 by the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1811-1813. Marine mammals and endangered species within the fishery conservation zone were subjected to federal jurisdiction by the Marine Mammal Protection Act of 1972, 16 U.S.C. 1362(15), 1372(a), and the Endangered Species Act of 1973, 16 U.S.C. 1538(a). The Secretary of Commerce is authorized by this Act to preempt regulation of fisheries within the territorial seas, 16 U.S.C. 1856(6), and, to designate marine sanctuaries for preserving or restoring ocean waters overlying the outer continental shelf and the Great Lakes. 16 U.S.C. 1432(a). Such a designation

statutes is set forth in some detail in *Commonwealth of Massachusetts* v. *Andrus,* 594 F.2d 872 (1st Cir. 1979). To provide an overlay of federal common law in this heavily regulated area would allow parties asserting particular interests to bypass the political process and the regulatory mechanisms Congress has set forth. Oil leasing, mineral exploration, dredging activities *et al.* could all be enjoined on the grounds that the federal regulator provided insufficient protection to the plaintiff's interests. The City of New York's sewerage activities affecting the ocean are all regulated by federal law and respondents may participate in the formulation of regulations governing them. But Congress has not provided for common law jurisprudence in this area.

We do not imply that pollution in the high seas affecting a State's sovereign interests is beyond the scope of a common law nuisance action brought by a State, *Illinois* v. *City of Milwaukee, supra* (unless that common law has been preempted; see Point III, *infra*). In addition, pollution reaching state territorial waters may be subject to the inherent police power of the States and to the water quality standards they promulgate under the Clean Water Act. See *Askew* v. *American Waterways Operators, supra,* 411 U.S. 325. Similarly, ocean pollution affecting the sovereign interests of the United States government may perhaps be actionable by the government, either pursuant to its inherent authority to regulate maritime affairs, and interstate and foreign commerce (see generally *New Jersey* v. *New York City,* 283 U.S. 473 (1931)).But as we noted above, the existence of this right of action in the sovereign does not imply that it is maintainable by private parties.

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severely limits the jurisdiction of either States or other federal agencies. See generally *Commonwealth of Massachusetts* v. *Andrus,* 594 F.2d 872 (1st Cir. 1979). The Secretary has not exercised his authority in the areas which are the subject of this lawsuit. In the Coastal Zone Management Act, 16 U.S.C. (1976 & Supp. II 1978) 1451-1464, Congress required the Secretary of Commerce to approve state "coastal zone management programs" that meet certain requirements. 16 U.S.C. (1976) 1454, 1455. Once a program has been approved, federal agencies must determine that their activities affecting the state's coastal zone are consistent with the program. 16 U.S.C. 1456(1)(1)-(2).

POINT III

THE CLEAN WATER AND THE MARINE PROTECTION ACTS PRESENT A COMPREHENSIVE SCHEME FOR THE ACHIEVEMENT OF LEVELS OF WATER QUALITY WHICH PROTECT STATE SOVEREIGN INTERESTS AND THE PUBLIC HEALTH AND WELFARE. THE STATUTORY SCHEME LEAVES NO ROOM FOR THE DEVELOPMENT OF COMMON LAW STANDARDS OF ACCEPTABLE LEVELS OF POLLUTION OR WATER QUALITY.

Under the Clean Water Act, discharges of pollution into navigable waters are permitted if they comply with federal and state effluent limitations and if they do not result in a violation of either state or federal water quality standards. 33 U.S.C. 1311(b)(1)(C); 1342(k). States have broad discretion in establishing their water quality standards, and, hence, in determining what levels of effluent reduction, beyond minimum federal technology-based limitations, must be employed. 33 U.S.C. 1313. The federal government also has powers over the quality of marine waters. 33 U.S.C. 1343. See pp. 4-6, *supra*.

The Marine Protection Act authorizes dumping from vessels only if the Administrator determines that the resulting pollution will not unreasonably degrade or endanger human health, welfare or the marine environment or violate applicable water quality standards. 33 U.S.C. 1412(a). Under current regulations EPA will not even issue a permit if the applicant fails to show a need for the dumping and lack of alternative means of disposal. 40 C.F.R. 227.2(a).

Under this regulatory scheme, there is no room for a federal common law of nuisance. The gaps and inadequacies of interstate pollution law identified in *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. 91, as requiring development of federal common law to adjudicate disputes impinging upon State sovereignty have been dealt with by federal statutes and regulations. The traditional standards applied in common law public

nuisance actions have been transferred from the Courts to federal and state officials for determination. In saving common law remedies, Congress did not preclude federal judges from deferring to agency expertise disputes concerning the proper method of pollution and control and sewage technology, and proper standards of water quality.

The Clean Water and Marine Protection Acts provide an explicit remedy for States to protect themselves from extra-territorial pollution. A State can determine for itself what level of water quality it wishes maintained. The Clean Water Act provides that water quality standards

> be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into account their use and value for navigation. 33 U.S.C. 1313(c)(2).

By delegating this broad authority to the States; by mandating that all discharges and dumping from vessels be such as to comply with state and federal water quality standards, 33 U.S.C. 1311(b)(1)(C) and 1412(a); by mandating that a permittee certify compliance with State standards, 33 U.S.C. 1341(a)(2); and by authorizing State intervention into the permit issuance process of another State when a receiving State's water quality standards may be affected, 33 U.S.C. 1342(b)(3) and (b)(5), Congress has provided a statutory mechanism to protect the unprotected sovereign interests identified in *Illinois* v. *Milwaukee*.

The logic to be applied in determining statutory preemption of federal common law does not differ substantially from the logic of federal preemption of state police powers. Compare *Arizona* v. *California*, 373 U.S. 546 (1963) with *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 164-165 (1978). The Congressional

mandate in both instances represents the supreme sovereign's determination of the manner in which members of the public shall conduct their activities. The legislative standards of conduct and water quality incorporated into the federal permits represent the sovereign police power which is the heart of public nuisance law. See Prosser, *supra,* 52 Va. L. Rev. at 997. The federal permitting procedures implement substantive federal and state rules developed to achieve the objects of the federal common law of nuisance. Non-statutory standards are superseded.

The district courts should not be available, at the behest of private parties or State legal officers, to grant *de novo* review of the judgment of federal and State officials as to the proper levels of water quality and methods of control in federal common law nuisance actions. Once federal and State officials have determined acceptable levels of water quality, once federal officials have determined that alternatives not be employed after considering the broad array of Congressionally mandated criteria, the legislative and political judgments of the responsible officials should be respected.

We are not arguing here that compliance with federal technology-based effluent limitations acts in itself as a shield from damages that state common law imposes upon a polluter. Rather, we are arguing that compliance with a permit under these statutes precludes a finding by a federal court under federal common law that a State's sovereign interests are being unreasonably infringed, or that the acts of pollution involved unreasonably degrade water quality or unreasonably infringe on public rights. In the Clean Water Act Congress has mandated that the States define what level of water quality protects the public welfare; citizens of those States and citizens of other States should be bound by the sovereign's determination. If a polluter's actions impose costs on others, the injured party may seek redress under state common law if it imposes such a liability, or from his legislature to reduce the amount of pollution that its officials have deemed acceptable. In the Marine Protection Act, federal officials have been given

authority to define acceptable levels of water quality in the oceans, and to weigh the need for the dumping in light of its environmental impact and the availability of alternatives. Precluding private parties from challenging the official judgment that, in light of these criteria, a given amount of pollution is not unreasonable would do no harm to the statutory scheme.

The critical question to be employed in a common law public nuisance action is determining what conduct constitutes an "unreasonable" interference with the public's rights.[23] The discharges involved in the case at hand cannot be deemed unreasonable either in and of themselves or in light of their impact. Under the common law no one user of the public's rights has priority over others. Pollution from municipal sewage treatment operations is not in and of itself unreasonable because it interferes with fishing. Sewage must be disposed of in some manner, and if the only known way is to use the oceans, there is no prima facie tort. See *Darling* v. *City of Newport News, supra,* 249 U.S. 540 (1919); *New York* v. *New Jersey,* 256 U.S. 296 (1921); and see cases collected in *Moore* v. *Hampton Roads Sanitation Commission,* 557 F.2d 1030, 1033 (4th Cir. 1977). The question is whether the means chosen are unreasonable or have an unreasonable impact. But in granting the city a permit to engage in the challenged conduct, federal and state officials have determined that the pollution in issue here is not unreasonable. Their balancing of competing needs and their judgment as to what are acceptable levels of water quality are virtually identical to that which would be employed in the common law tort action. Cf. *Forrester* v. *Consumer Product Safety Comm'n,* 559 F.2d 774, 789 (D.C. Cir. 1977); *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n,* 569 F.2d 831, 839 (5th Cir. 1978).

We do not question the power of Congress to create a regulatory scheme which delegates to state and federal officials the authority to determine what levels of water quality would

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23 See Prosser, *supra* p. 20, n.13, 52 Va. L. Rev. at 1003; see also W. Prosser, *Law of Torts* (4th ed. 1971), 576-577.

be deemed reasonable and allow, at the same time, for parties to attempt to persuade federal judges in common law actions that the officially sanctioned levels of pollution were unreasonable. But such an approach would be wasteful, duplicative, and in conflict with traditional notions of deference to the officials upon whom Congress has placed the responsibility of carrying out its will. The regulations which govern ocean pollution implement a highly complex and technical statute. Every discharge from every point source must have a permit reflecting applicable regulations. The Administrator is given discretion to make legislative, policy-type judgments. See *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. den.* 426 U.S. 941 (1976). If the Administrator determines that elimination of a given pollutant is not necessary to meet water quality standards applicable under 33 U.S.C. 1311(b)(1), or that elimination of a pollutant is not practicable under 33 U.S.C. 1281(g)(2)(a), his determination reflects the legislative judgment. The absence of a particular control methodology does not mean an absence of Congressional policy. Traditional standards of review should not be circumvented by common law actions that amount to collateral attacks on discretionary agency decisions.

When Congress protected common law remedies by enacting a savings clause in the citizen suit provisions of these statutes, it did not have before it a developed body of federal common law governing pollution of interstate waters. See *Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191, 196, n.5 (1967). It is not unreasonable to conclude that Congress intended to save state common law remedies, and not an inchoate body of federal common law. See *Committee for Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 n.9 (4th Cir. 1976). See also pp. 12-13, *supra.*

CONCLUSION

Petitioners City of New York and Beame respectfully request that the judgment of the Court of Appeals be reversed and that the case be remanded with directions to dismiss the complaint herein.

Respectfully submitted,

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December 4, 1980

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APPENDIX

Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401-1412a:

§ 1401. Congressional finding, policy, and declaration of purpose

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.

§ 1402. Definitions

For the purposes of this chapter the term—

(a) "Administrator" means the Administrator of the Environmental Protection Agency.

(b) "Ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(c) "Material" means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, and industrial, municipal, agricultural, and other waste; but such term does not mean sewage from vessels within the meaning of section 1322 of this title. Oil within the meaning of section 1321 of this title shall be included only to the extent that such oil is taken on board a vessel or aircraft for the purpose of dumping.

(d) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(e) "Person" means any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

(f) "Dumping" means a disposition of material: *Provided,* That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act, as amended under the provisions of section 407 of this title, or under the provisions of the Atomic Energy Act of 1954, as amended, nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: *Provided further,* That it does not mean the construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program: *And provided further,* That it does not include the deposit of

oyster shells, or other materials when such deposit is made for the purpose of developing, maintaining, or harvesting fisheries resources and is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program.

(g) "District court of the United States" includes the District Court of Guam, the District Court of the Virgin Islands, the District Court of Puerto Rico, the District Court of the Canal Zone, and in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii, which court shall have jurisdiction over actions arising therein.

(h) "Secretary" means the Secretary of the Army.

(i) "Dredged material" means any material excavated or dredged from the navigable waters of the United States.

(j) "High-level radioactive waste" means the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors.

(k) "Transport" or "transportation" refers to the carriage and related handling of any material by a vessel, or by any other vehicle, including aircraft.

(l) "Convention" means the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

SUBCHAPTER I—REGULATION

§ 1411. Prohibited acts

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

(1) no person shall transport from the United States, and

(2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

§ 1412. Dumping permit program

Environmental Protection Agency permits

(a) Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents and high-level radioactive waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health,

welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issued for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

Permit categories

(b) The Administrator may establish and issue various categories of permits, including the general permits described in section 1414(c) of this title.

Sites and times for dumping

(c) The Administrator may, considering the criteria established pursuant to subsection (a) of this section, designate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

Fish wastes

(d) No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or en-

closed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

Foreign State permits; acceptance

(e) In the case of transportation of material, by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section.

§ 1412a. Cessation of sewage sludge ocean dumping; "sewage sludge" defined

(a) The Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the "Administrator") shall end the dumping of sewage sludge into ocean waters, or into waters described in section 1411(b) of this title, as soon as possible after November 4, 1977, but in no case may the Administrator issue any permit, or any renewal thereof (under Title I of the Marine Protection, Research, and Sanctuaries Act of 1972) which authorizes any such dumping after December 31, 1981.

(b) For purposes of this section, the term "sewage sludge" means any solid, semisolid, or liquid waste generated by a municipal waste-water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

The Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. II) 1332, 1333, and 1349:

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national

interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the water or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for settling any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

§ 1349. Citizens suits, jurisdiction and judicial review—Persons who may bring action; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(a)(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to

the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a

sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

Jurisdiction and venue of actions

(b)(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of Title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may demand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

The Outer Continental Shelf Lands Act, 43 U.S.C. (1976) (superceded) 1332 and 1333:

§ 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and

seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or thereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953, are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

The Submerged Lands Act of 1953, 43 U.S.C. Sections 1301(e), 1311(a), 1311(d).

43 U.S.C. 1301(e) (Definitions):

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish,

shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

§ 1311. Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

* * * * *

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;